

Recommendations:

■ The EPA should plainly state how WOTUS rulemaking will impact storm-water collection systems and clearly exempt those parts of the systems that EPA does not wish to include. (Goodmann Letter)

8.c. Are there other considerations such as ditch maintenance, stormwater management or green infrastructure?

Background

Rule language should not have broad inclusions and cities are concerned that jurisdictional calls will be dependent upon agency judgments and discretion for exclusions. The criteria need to be clear enough that cities do not have to either guess at application of a rule or wait for the agency to interpret a rule which creates uncertainty. It is unworkable for cities to rely on agency judgments and discretion for exemptions. There is a concern about the magnitude of the requests the agencies will be forced to address and the timeliness of the agencies' responses given any uncertainty of a new rule. Cities cannot be faced with significant delays to address critical storm-water infrastructure while waiting for agency action. Cities should be provided clarity by the agencies so that they can effectively plan and budget for the operation and maintenance of the storm-water collection systems without the uncertainty of the discretion of the agencies and when it will receive that agency judgment. In addition, without a specific exemption for MS4 systems including drains, roads, pipes, curbs, gutters, ditches and other components that channel runoff, as well as non-MS4 storm-water systems and features/components, EPA and Army Corps open the door for litigation and citizen suits that could determine that they are considered a "Waters of the U.S." and thereby subject to Section 404 permitting and state Water Quality Standards. (Goodmann Letter)

■ The EPA should exempt green infrastructure from jurisdiction and outline the Agency's definition of what is included within green infrastructure similarly as for agricultural practices for 'normal farming practices'. (Goodmann Letter)

IV. Cost to Local Government**Background**

The LGAC heard extensive concerns that the US Army Corps of Engineers simply does not have enough resources to effectuate an efficient permit process now, or under a new rule, without additional resources. An ineffective permit process consumes scarce local, state and federal personnel and financial resources without achieving a value-added return on investment. A revised rule and the permitting process and implementation must recognize the scarcity of these resources such that results are optimized for the level of investment. (LGAC 2014 Report) Delays and additional permitting do not get calculated into a simplistic understanding of affordability of 2 percent of median household income (MHI), which the Agency utilizes to make determinations on significant cost impacts to local communities (Goodmann letter).

Recommendations:

The LGAC recommends that the EPA continue to coordinate with the US Army Corps of Engineers to ensure that the permit process is predictable and value-added. The proposed rule must be viewed in the context of how it will be implemented to validate that the resource protection outcome is balanced against the economic cost of the permitting process. Local, tribal and state agencies are at the front lines of achieving the goals of the Clean Water Act. Engaging local agencies as collaborative partners in the conversation with EPA and the US Army Corps of Engineers regarding implementation can only improve the process and the desired water resources protection results. (LGAC 2014 Report)

The LGAC recommends that EPA better understand the cost and resource implications, especially to local, state and tribal agencies, before drafting a revised rule. Local agencies are very concerned about cost, which is exacerbated by the uncertainty in the permitting process. (LGAC 2014 Report)

V. CONCLUSION

The Local Government Advisory Committee (LGAC) provides a strong connection between the EPA and the communities striving to provide clean drinking water and maintain healthy source water. The LGAC's 'Waters of the United States' 2017 Report provides a series of recommendations that offer the EPA practical solutions to complex challenges based on the experience of local and tribal governments. The LGAC is confident that our concepts and approaches can assist the EPA in developing a regulatory framework that inspires communities to act in the interest of clean, safe and affordable drinking water.

Many communities have already invested their resources in green infrastructure, integrated planning and innovation that advances the state of practice. Local, tribal and state governments are already leading clean water initiatives in their jurisdictions. EPA can utilize this experience, captured in the LGAC report, to develop clear, predictable, flexible and locally adaptable approaches to regulation.

Thank you to the EPA Administrator and the EPA Team for their partnership with the LGAC in advancing the goal of clean, safe and affordable drinking water across the United States.



APPENDIX

Disclaimer: *This Report reflects what was conveyed during the course of the LGAC meetings. The Committee is not responsible for any potential inaccuracies that may appear in the Report as a result of information conveyed. Moreover, the Committee advises that additional information sources be consulted in cases where any concern may exist about statistics or any other information.*

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Roster of LGAC Members

Waters of the United States
2017 Report

2017 ROSTER LGAC AND SCAS MEMBERS**Chair of LGAC****The Honorable Bob Dixon****Mayor, Greensburg, KS****Greensburg, KS****Chair of SCAS****The Honorable Robert Cope****Commissioner, Planning and Zoning, Salmon, ID****Salmon, ID****LGAC AND SCAS MEMBERS****Region 1****Mr. Rodney Bartlett****Town Administrator****Peterborough, New Hampshire****(SCAS Only)****The Honorable Kim Driscoll****Mayor, City of Salem****Salem, MA****The Honorable Miro Weinberger****Mayor, City of Burlington****Burlington, VT****The Honorable Jill Dusen (Vice-Chair)****Councilor, Portland, Maine****Portland, Maine****Region 2****Samara Swanston, Esq.****Counsel to NYC Council Environmental Protection Committee, New York, NY****New York, NY**

The Honorable Dawn Zimmer

Mayor, Hoboken, NJ

Hoboken, NJ

The Honorable Manna Jo Greene

County Legislator, Ulster County, NY

District 19 Rosendale, NY

Region 3

The Honorable Sal Panto, Jr.

Mayor, City of Easton

Easton, PA

The Honorable Stephen T. Williams

Mayor, Huntington, WV

Huntington, WV

Region 4

The Honorable Merceria Ludgood

Commissioner, Mobile County

Mobile County, AL

The Honorable Johnny DuPree, Ph.D.

Mayor

Hattiesburg, MS

The Honorable Kitty Barnes

Commissioner, Catawba County, NC

Terrell, NC

The Honorable Hardie Davis

Mayor, City of Augusta, GA

Augusta, GA

Ms. Susan Hann

Director, Planning Palm Bay County Schools, FL

Palm Bay County, FL

Region 5

The Honorable Stephanie Chang

State Representative- House District 6

State of Michigan

The Honorable Victoria Reinhardt

Commissioner, Ramsey County, MN

St. Paul, MN

The Honorable Elizabeth Kautz

Mayor, Burnsville, MN

Burnsville, MN

The Honorable Karen Freeman-Wilson

Mayor, Gary, IN

Gary, IN

Mr. Kevin Shafer, PE

Executive Director, Milwaukee Metropolitan Sewerage District

Milwaukee, WI

Region 6

The Honorable Mark Stodola

Mayor, City of Little Rock

Little Rock, Arkansas

The Honorable Norm Archibald

Mayor, City of Abilene, TX

Abilene, TX

Jeff Witte

Secretary of Agriculture, New Mexico

New Mexico

Dr. Hector Gonzalez, MD

Director of Health Department, Laredo, TX

Laredo, TX

Region 7

Teri Goodman

Assistant City Manager, City of Dubuque

Dubuque, IA

The Honorable Tom Sloan

State House Representative, State of Kansas

Kansas

Region 8

The Honorable Andy Beerman
City Councilor
Park City, UT

The Honorable Brad Pierce
Council Member, City of Aurora, CO
Aurora, CO

Region 9

The Honorable Cynthia Koehler
Board of Directors, Marin County
Marin County, CA

The Honorable David Bobzien
City Councilmember At-Large - City of Reno
Reno, NV

The Honorable Mary Casillas Salas
Mayor, City of Chula Vista
Chula Vista, CA

Scott Bouchie
Environmental Management and Sustainability Director - City of Mesa
Mesa, AZ

The Honorable Ryan Sundberg
Supervisor, Humboldt County, CA
Humboldt County, CA

Region 10

Susan Anderson
Director, Portland Bureau of Planning and Sustainability
Portland, OR

The Honorable Shawn Yarity
Chairman, Stillaguamish Tribe
Arlington, WA

APPENDIX 2

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE (LGAC) DRAFT CHARGE
ON 'WATERS OF THE U.S.' (WOTUS)

OVERVIEW

Background and Description

On February 28, 2017, the President signed the Executive Order on *Restoring the Rule of Law, Federalism, and Economic Growth* by reviewing the "Waters of the United States" Rule (issued June 2015).⁸ The Executive Order gives direction to the Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule (CWR) and "publish for notice and comment proposed rule rescinding or revising the rule." The E.O. also directs that EPA and the Army "shall consider interpreting the term 'navigable waters' in a manner "consistent with Justice Scalia's opinion in *Rapanos*"⁹ which includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

As part of EPA's efforts to consult with state and local government officials, EPA's Local Government Advisory Committee (LGAC) will provide its recommendations to the Administrator on revising the definition of "Waters of the United States" (WOTUS) and identifying ways to reduce the regulatory burden on local communities as well as balance that with environmental protection.

Project Scope

The agencies intend to follow an expeditious two-step process to provide certainty with the rule:

- 1) Establish the legal status quo by re-codifying the regulation that was in place prior to issuance of the CWR now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
- 2) Propose a new definition of Waters of the U.S. that would replace the 2015 CWR that reflects the principles outlined by Justice Scalia (*Rapanos* plurality opinion).

The LGAC consists of 36 local, state and tribal government elected and appointed officials representing cities, parishes, counties, municipalities, and other local political jurisdictions. Local officials are knowledgeable and provide unique perspectives on issues relating to a revised rule. Further, the LGAC has potential to engage other knowledgeable local officials with unique valuable on-the-ground perspectives and knowledge. Through this collaborative process, the chartered LGAC will provide Administrator Pruitt with expeditious and meaningful advice relating to a revised "Waters of the U.S." rule. Overall, the goal would be to develop recommendations to the EPA for consideration on a revised rule. This advice and recommendations come from an 'on the ground' local government perspective which will assist the agency in providing the best means to communicate a revised rule with local officials.

Charge Issues

LGAC Charge:

The LGAC will develop recommendations for the EPA to consider in developing approaches to a revised rule defining "waters of the U.S." that ensures that the nation's waters are kept free from pollution while at the

⁸ <https://www.whitehouse.gov/the-pres-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

⁹ *Rapanos v. United States*, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 LEd. 2d 159

same time promoting economic growth and minimizing regulatory uncertainty. The following are specific charge questions and issues for the LGAC to consider:

Charge Questions

- 1) How would you like to see the concepts of 'relatively permanent' and 'continuous surface connection' be defined? How would you like to see the agencies interpret 'consistent with Scalia'? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?
- 2) What opportunities and challenges exist for your locality with relying on Justice Scalia's opinion?
- 3) Are there other approaches to defining "waters of the U.S." that you would like the agencies to consider to providing clarity and regulatory certainty?
- 4) The agencies' economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your locality that could be affected but would not be captured in such an economic analysis?
- 5) What additional information can you provide from a local government perspective that EPA should be aware of?
- 6) Are there other issues the agencies should consider which would help ease the regulatory burden for implementation of WOTUS for state, local and tribal government?
- 7) What should the agencies consider in communicating the final rule to state, local and tribal governments to help them fully understand these regulatory changes and implementing them efficiently and most cost-effectively?
- 8) The Workgroup will also develop recommendations on how the EPA can better work with local governments and engage local governments on issues such as: What additional regulatory issues could be revised or clarified to more effectively to help local governments understand how this rule would apply? Are there additional policy discussions that could help address local questions about implementation, in agricultural and rural small communities? Are there other considerations such as ditch maintenance, stormwater management or green infrastructure?

Deliverables

The LGAC will provide a letter of recommendation to the Administrator to identify approaches to consider in a revised "Waters of the U.S." rule. The chartered LGAC will prioritize and summarize these issues in a report to the EPA that focuses on the charge issues. A final LGAC report will be conveyed to the EPA Administrator with a transmittal letter summarizing findings and recommendations. This Report will be published on the EPA's website for LGAC.

Preliminary Timeline/Schedule

1876 **April 26, 2017** – Executive Committee meets to discuss and approve the LGAC's Charge (Protecting America's Waters Workgroup)
1877 and develops a work plan with timeline.

1878 **May 3**– LGAC's Protecting America's Waters Workgroup meets to discuss charge (via teleconference).

1879 **May 18**- LGAC's Protecting America's Waters Workgroup meets with National Intergovernmental organizations to discuss charge
1880 (via teleconference).

1881 **June 7** – LGAC's Protecting America's Waters Workgroup meets to discuss charge (via teleconference).

1882 **June 29, 2017**-The LGAC meets in a public meeting (via teleconference) to review recommendations on rescission of the 2015 CWR
1883 and revising the CWR. (Deliverable: Letter of Recommendation)

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EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE (LGAC) DRAFT CHARGE ON 'WATERS OF THE U.S.' (WOTUS)

OVERVIEW

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As part of EPA's efforts to consult with state and local government officials, EPA's Local Government Advisory Committee (LGAC) will provide its recommendations to the Administrator on revising the definition of "Waters of the United States" (WOTUS) and identifying ways to reduce the regulatory burden on local communities as well as balance that with environmental protection.

2. Project Scope

The agencies intend to follow an expeditious two-step process to provide certainty with the rule:

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¹ <https://www.whitehouse.gov/the-pres-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

² *Rapanos v. United States*, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 L.Ed. 2d 159

3. Charge Issues

LGAC Charge:

The LGAC will develop recommendations for the EPA to consider in developing approaches to a revised rule defining “waters of the U.S.” that ensures that the nation’s waters are kept free from pollution while at the same time promoting economic growth and minimizing regulatory uncertainty. The following are specific charge questions and issues for the LGAC to consider:

Charge Questions

- 1) How would you like to see the concepts of ‘relatively permanent’ and ‘continuous surface connection’ be defined? How would you like to see the agencies interpret ‘consistent with Scalia’? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?
- 2) What opportunities and challenges exist for your locality with relying on Justice Scalia’s opinion?
- 3) Are there other approaches to defining “waters of the U.S.” that you would like the agencies to consider to providing clarity and regulatory certainty?
- 4) The agencies’ economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your locality that could be affected but would not be captured in such an economic analysis?
- 5) What additional information can you provide from a local government perspective that EPA should be aware of?
- 6) Are there other issues the agencies should consider which would help ease the regulatory burden for implementation of WOTUS for state, local and tribal government?
- 7) What should the agencies consider in communicating the final rule to state, local and tribal governments to help them fully understand these regulatory changes and implementing them efficiently and most cost-effectively?
- 8) The Workgroup will also develop recommendations on how the EPA can better work with local governments and engage local governments on issues such as: What additional regulatory issues could be revised or clarified to more effectively to help local governments understand how this rule would apply? Are there additional policy discussions that could help address local questions about implementation, in agricultural and rural small communities? Are there other considerations such as ditch maintenance, stormwater management or green infrastructure?

4. Deliverables

The LGAC will provide a letter of recommendation to the Administrator to identify approaches to consider in a revised "Waters of the U.S." rule. The chartered LGAC will prioritize and summarize these issues in a report to the EPA that focuses on the charge issues. A final LGAC report will be conveyed to the EPA Administrator with a transmittal letter summarizing findings and recommendations. This Report will be published on the EPA's website for LGAC.

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April 26, 2017 – Executive Committee meets to discuss and approve the LGAC's Charge (Protecting America's Waters Workgroup) and develops a work plan with timeline.

May 3– LGAC's Protecting America's Waters Workgroup meets to discuss charge (via teleconference).

May 17- LGAC's Protecting America's Waters Workgroup meets with National Intergovernmental organizations to discuss charge (via teleconference).

June 7 – LGAC's Protecting America's Waters Workgroup meets to discuss charge (via teleconference).

June 28, 2017-The LGAC meets in a public meeting (via teleconference) to review recommendations on rescission of the 2015 CWR and revising the CWR. (Deliverable: Letter of Recommendation)

APPROVAL AND AUTHORITY TO PROCEED

We approve the project as described above, and authorize to proceed.

Name	Title	Date

Approved By

Date

Approved By

Date

3
4
5 Honorable E. Scott Pruitt
6 Administrator
7 U.S. Environmental Protection Agency
8 1200 Pennsylvania Avenue NW
9 Washington, D.C. 20460
10

11 Dear Administrator Pruitt:

12 We are writing on behalf of your Local Government Advisory Committee (LGAC),
13 which is composed of 35 elected and appointed officials of state, local and tribal
14 government. We very much appreciate the opportunity to provide input on
15 clarifying the regulatory status of "Waters of the United States" (WOTUS). We
16 also commend your leadership in recognizing and resolving the regulatory
17 confusion and complexity of WOTUS by issuing a new rule.
18

19 The LGAC has been engaged regarding Waters of the United States since May
20 2014. Through a series of outreach meetings and conference calls, the LGAC has
21 heard over 60 hours of comments and recommendations from our colleagues
22 across the United States. The LGAC Waters of United States 2017 Report is a
23 compilation of recommendations from a diverse group of local leaders who
24 have experienced the current regulatory framework.
25

26 One of the most important themes we have heard and experienced is the lack of
27 clarity and predictability in the current permitting process. The EPA's
28 partnership with the U.S. Army Corps of Engineers is a tremendous step towards
29 resolving these issues that impede economic growth and hamper public
30 infrastructure projects.
31

32 Although permitting is a complex issue, some practical solutions such as
33 establishing a less than 90 -day time frame for jurisdictional determinations can
34 significantly ease the regulatory uncertainty. In addition, state-specific or
35 region-specific criteria can be developed to provide much needed flexibility
36 within a national standard. The LGAC also supports exemptions such as ditches,
37 stormwater management systems, green infrastructure, normal farming
38 practices and converted crop lands. Additional exemptions may be appropriate
39 at the regional level, such as in the West with ephemeral streams.
40
41

42 This approach also invites an enhanced state and local role in implementing the Clean Water Act Section
43 404 and WOTUS. Local governments are very interested in being part of the solution, but will need
44 dedicated resources to fully assist through assumption of the Section 404 program and for greater
45 utilization of state and regional general permits.

46
47 As local government officials, the availability and accessibility of clean and safe water is one of our
48 highest priorities. Source water protection is a key element and certain water bodies may need case
49 specific jurisdictional reviews. The LGAC recommends that EPA work with state and local government to
50 identify these significant waterbodies and provide maps of these areas. Improving transparency and
51 predictability will ease the regulatory uncertainty that currently exists.

52
53 In summary, the LGAC appreciates your leadership and collaboration with local, tribal and state
54 partners. We offer our continued assistance to you, Administrator Pruitt, and to the team at EPA as you
55 move forward. The opportunity exists to develop a clear and predictable regulatory framework that will
56 protect source water and provide clean, safe and affordable water for the American people. Thank you
57 for the opportunity to comment and for your consideration of our recommendations.

58
59 Sincerely,

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61
62 Mayor Bob Dixon
63 Chairman

Ms. Susan Hann, P.E.
Chairwoman, Protecting America's
Waters Workgroup

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65
66
67 Commissioner Dr. Robert Cope
68 Chairman, Small Community Advisory
69 Subcommittee (SCAS)

Dr. Hector Gonzalez, M.D.
Chairman, Environmental Justice Workgroup

The Definition of “Waters of the U.S.”

E.O. 13132 Federalism Consultation Meeting

April 19, 2017

Purpose & Agenda

Purpose:

- Initiate Federalism consultation to obtain state and local government officials' perspectives
- Provide an overview of potential changes under consideration for the definition of "Waters of the U.S."

Agenda:

- Federalism overview
- "Waters of the U.S." over time
- The Executive Order
- Proposed two-step process
 - Step 1
 - Step 2
- Discussion of Potential Approaches
- Next steps

E.O. 13132, Federalism

The Order requires that Federal agencies consult with elected state and local government officials, or their representative national organizations, when developing regulations that have federalism implications.

The agencies are consulting due to strong interest on the part of state and local governments on this issue over the years and potential effects associated with a change in the definition of “waters of the U.S.”

“Waters of the U.S.” Over Time

From the 1970s through the 1990s, the majority of federal courts, as well as the agencies, consistently interpreted a broad scope of Clean Water Act jurisdiction.

Supreme Court decisions in 2001 and 2006 held that the scope of navigable waters must be linked more directly to protecting the integrity of waters used in navigation. The justices in the 2006 *Rapanos* decision were split on how this was to be accomplished.

The agencies have been working since these Supreme Court decisions to provide clarification and predictability in the procedures used to identify waters that are – and are not – covered by the Clean Water Act.

The 2015 Clean Water Rule was an effort to provide that needed clarification and predictability. Many stakeholders, including many states, expressed concerns with the 2015 Rule.

The agencies are now embarking on another effort to provide clarity and predictability to members of the public.

The Executive Order

On February 28, 2017, the President signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

The E.O. calls on the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule and “publish for notice and comment a proposed rule rescinding or revising the rule....”

The E.O. directs that EPA and the Army “shall consider interpreting the term ‘navigable waters’” in a manner “consistent with Justice Scalia’s opinion” in *Rapanos*. Justice Scalia’s opinion indicates CWA jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

<https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

Two-Step Process

The agencies are implementing the Executive Order in two steps to provide as much certainty as possible as quickly as possible to the regulated community and the public during the development of the ultimate replacement rule.

1. The agencies are taking action to establish the legal status quo in the Code of Federal Regulations, by recodifying the regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
2. The agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

The agencies are aware that the scope of CWA jurisdiction is of intense interest to many stakeholders and therefore want to provide time for appropriate consultation and deliberations on the ultimate regulation.

In the meantime, the agencies will continue to implement regulatory definition in place prior to the 2015 rule, consistent with the 2003 and 2008 guidances, in light of the *SWANCC* and *Rapanos* decisions, pursuant to the Sixth Circuit stay of the Clean Water Rule.

Step 1: Withdraw 2015 Clean Water Rule

While the Sixth Circuit stay may remain in effect for some time, its duration is uncertain.

To provide greater certainty, the agencies will move to reinstate the preexisting regulations and guidance and to withdraw the 2015 Rule.

In the Step 1 proposed rule, the agencies will define “waters of the United States” using the regulatory definition in place before the Clean Water Rule, which the agencies will continue to implement according to longstanding practice, just as they are today.

The Step 1 proposed rule would maintain the approach in place for decades until a revised rule with a new definition can be promulgated.

Step 2: Develop New Rule Consistent with the Executive Order

The E.O. directs the agencies to consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

Justice Scalia’s opinion indicates Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

The agencies are consulting with state and local government officials as we begin to develop the new definition.

Potential Approaches to “Relatively Permanent” Waters

Perennial plus
streams with
“seasonal” flow

Current practice:
seasonal flow =
about 3 months
(varies
regionally)

Perennial plus
streams with another
measure of flow

Use appropriate,
implementable
metrics, e.g.,
frequency of flow,
intersecting water
table

Perennial streams
only

Streams
that carry flow
throughout the
year except in
extreme drought

Other

Thoughts?